

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 04-0072
RESPONSIBLE OFFICER
SALES TAX
For Tax Periods: 2002-2003**

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Issues

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273:.

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes.

Statement of Facts

The taxpayer was one third shareholder in a corporation that did not remit the proper amount of sales taxes to Indiana. The taxpayer was personally assessed for the taxes and protested these assessments. Taxpayer protested that he was an investor and not an officer of the corporation and that in an effort to protect his investment he had taken the other two shareholders to court and had them removed from the operations of the business.

Sales and Withholding Tax-Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person’s position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The taxpayer was the primary investor in the corporation at the time of its incorporation and had significant authority by his ownership of shares in the corporation. However, he contends that he had no involvement in the day to day operations and has provided copies of relevant court orders and transcripts from the hearings on this matter that establish his position as an investor only and prove that he did not have control over the finances of the business. Based on his establishment in a contested court proceeding of his absence of control over the finances of the business, taxpayer has established that he does not meet the third factor outlined in Safayan. Taxpayer protest is sustained.

Finding

The taxpayer’s protest is sustained.